> Based on our current case law, defendant's Second Amendment challenge to the constitutionality of § 922(g) is without merit. *See Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (ruling that the Second Amendment does not confer an individual right to possess arms), *cert. denied*, 540 U.S. 1046 (2003); *see also United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (rejecting a Second Amendment challenge to the felon-firearm possession statute and holding that § 922(g)(1) "represents a limited and narrowly tailored exception to the freedom to possess firearms, reasonable in its purposes and consistent with the right to bear arms protected under the Second Amendment").
>
> *United States v. Younger*, 398 F.3d 1179 (9th Cir. 2005).

In the Fifth Circuit there is, though apparently Congress has the authority to regulate that right.

> Although, as we have held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. Indeed, Emerson does not contend, and the district court did not hold, otherwise. As we have previously noted, it is clear that felons, infants and those of unsound mind may be prohibited from possessing firearms.

Id. at 261. *Emerson* also discusses authority that legislative prohibitions on the ownership of firearms by felons are not considered infringements on the

> historically understood right to bear arms protected by the Second Amendment. *Id.* at 226 n. 21.
>
> *United States v. Darrington*, 351 F.3d 632 (5th Cir. 2003).

Thirty years ago the Sixth Circuit decided that there is no *individual* right to possess arms.

> Since the Second Amendment right "to keep and bear Arms" applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm.
>
> It is also established that the *collective right* of the militia is limited to keeping and bearing arms, the possession or use of which "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, ..."
>
> *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 96 S.Ct. 3168 (1976) (citations omitted).

More recently the Sixth Circuit has recognized that current firearms laws are unconstitutional.

> [I]t is apparent that the enforcement tactics made possible by current firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and other high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement. . . . The [BATF's] own figures demonstrate that in recent years the percentage of its arrests devoted to felons in

> possession and persons knowingly selling to them have dropped from 14 percent down to 10 percent of their firearms cases [and that] 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and that a third involve citizens with no police record whatsoever.
>
> *United States v. Cassidy*, 899 F.2d 543, 546 n. 9 (6th Cir. 1990).

In the Third Circuit Petitioner has no Second Amendment rights at all based on a 1996 case.

> Willaman first argues that 18 U.S.C. § 922 ("section 922") violates the Second Amendment, and that "Congress had no right to amend the Second Amendment merely by legislation," Reply Br. at 7. Thus, in his view, the district court should have dismissed the indictment and allowed him to make a jury nullification argument. We review the district court's order upholding the constitutionality of section 922 and refusing to dismiss the indictment or allow a jury nullification argument on a plenary basis. *See United States v. Rybar*, 103 F.3d 273, 275 (3d Cir. 1996). We will not linger on this point inasmuch as a number of our cases, including *Rybar* in which we held that "this court has on several occasions emphasized that the Second Amendment furnishes no absolute right to firearms," 103 F.3d at 286, foreclose Willaman's Second Amendment arguments. Though Willaman argues that *Rybar* "is simply bad law," Reply Br. at 8, plainly it is binding on this panel. See Third Circuit I.O.P. 9.1.
>
> *United States v. Willaman*, 437 F.3d 354 (3d Cir. 2006).

As our most-recently-appointed Supreme Court Justice pointed out in his dissent in *Rybar*, *Rybar* is in fact "simply bad law."

> Was *United States v. Lopez*, 115 S.Ct. 1624 (1995), a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power? The statutory provision challenged in this case, the portion of 18 U.S.C. Section(s) 922(o) that generally prohibits the purely intrastate possession of a machine gun, is the closest extant relative of the statute struck down in *Lopez*, 18 U.S.C. Section(s) 922(q)(1)(A), which made it a federal offense knowingly to possess a firearm in a school zone. Both are criminal statutes that regulate the purely intrastate possession of firearms. Both statutes, departing from the mold of prior federal criminal statutes governing firearms possession, lack a jurisdictional element . . ., that is, they do not require federal prosecutors to prove that the firearms were possessed in or affecting interstate commerce. Compare, *e.g.*, 18 U.S.C. Section(s) 922(d). And in passing both statutes, Congress made no findings regarding the link between the intrastate activity regulated by these laws and interstate commerce. If *Lopez* does not govern this case, then it may well be a precedent that is strictly limited to its own peculiar circumstances. That may be what the majority here would like, see Maj. Op. at 28 (citation omitted) ("challenges based on *Lopez* '[a]lmost invariably' fail"), but our responsibility is to apply Supreme Court precedent. That responsibility, it seems to me, requires us to invalidate the statutory provision at issue here in its present form.
>
> *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (footnotes omitted) (Alito, C.J., dissenting).

Anywhere in the world one can browse the Internet and discover why the Bill of Rights were added to the U.S. Constitution:

> **United States Bill of Rights.** In the United States, the Bill of Rights is the term for the first ten amendments to the United States Constitution. These amendments explicitly limit the Federal government's powers, protecting the rights of the people by preventing Congress from abridging freedom of speech, freedom of the press, freedom of assembly, freedom of religious worship, or *the right to bear arms*, preventing unreasonable search and seizure, cruel and unusual punishment, and self-incrimination, and guaranteeing due process of law and a speedy public trial with an impartial jury.
>
> Wikipedia, free encyclopedia, http://en.wikipedia.org

How is it that those who study history have a perfect understanding of the rights of individuals provided by the United States Constitution and can present it simply and in plain English but federal judges cannot nor can they agree on what they are?

> It is not the technical legal conception that leads to the decisions pronounced by the judge, but it is the decision which the judge intends to pronounce which lead him to the finding of the technical reasons therefor—the decisions themselves being the result of the judge's views on the social and economic questions involved in the solution of the apparently abstract constitutional problems.
>
> Louis B. Boudin, *Government by Judiciary*, Vol. I, page 338 (1932).

Obviously, without guidelines from this Court, the right to bear arms is determined by geographic location within the United States—some individuals have the right while others do not.

Invalidating 18 U.S.C. § 922 is all the Petitioner in *this* action, Terrance Ross Willaman, is asking *this* Court to do *now*.

> The Second Amendment . . . appears to contain an express limitation on the government's authority. That Amendment provides: "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment. If, however, the Second Amendment is read to confer a *personal* right to "keep and bear arms," a colorable argument exists that the Federal Government's regulatory scheme, at least as it pertains to the purely intrastate sale or possession of firearms, runs afoul of that Amendment's protections. As the parties did not raise this argument, however, we need not consider it here. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic." 3 J. Story, *Commentaries* § 1890, page 746 (1833) (footnote 2 omitted).
>
> *Printz v. United States*, 117 S.Ct. 2365, 2385-86 (1997) (Justice Thomas, concurring) (footnote omitted).

Federal judges have a duty to enforce the Constitution,

whether they agree with it or not. Lund, *The Second Amendment, Political Liberty, And The Right To Self-Preservation*, 39 Alabama Law Review 103 (1987-1988).

The legislature has recognized that the Second Amendment is an individual right, as has the Executive Branch.

See *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress, Second Session, February 1982 (legislative position) and *Whether the Second Amendment Secures an Individual Right*, Memorandum Opinion of the Attorney General, August 24, 2004 (executive branch position).

The question that then must be answered by this Court (or the Congress if this Court refuses to do its duty) is this:

What, precisely, did the Second Amendment mean in 1791 when it was enacted?

What did each clause of the Second Amendment mean in 1791?

A Well Regulated Militia

The militia is all citizens capable of bearing arms. *Presser v. Illinois*, 116 U.S. 252, 265 (1886). See also 10 U.S.C. § 311(a), *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) (militias pre-dated Constitution). See also Lund, *supra*, at 107 n. 8 ("well-regulated" meant properly disciplined [trained]) not government controlled").

The Right of the People to Keep and Bear Arms

The "right of the people to keep and bear arms" did not and does not refer to "sporting purposes." Kopel, *It Isn't About Duck Hunting: The British Origins of the Right To Keep And Bear Arms*, 93 Mich. L. Rev. 1333 (May 1995).

It included not only the right to be armed but to be armed at a level equal to the government. Vandercoy, *The History of the Second Amendment*, 28 Valparaiso Univ. L. Rev. 1007, 1009 (1993-1994).

I.e., if the Government may own machineguns, then "the people" must be allowed to own machineguns. Technically, defendant's weapon was not a machinegun; it was a sub-machinegun, a fully automatic weapon that shot pistol bullets, a weapon so weak, antique, and ineffectual that the rounds from it would not even penetrate a bulletproof vest.

See also, Hays, *The Right to Bear Arms: A Study In Judicial Misinterpretation*, 2 Wm.& Mary L. Rev. 381 (1960). See especially p. 395: Congress has the power to *arm* the militia, not *dis-arm*.

Shall Not Be Infringed

The phrase "shall not be infringed" means precisely that, *not* be *infringed*.

> **Infringement:** An encroachment, as of a right or privilege.—The American Heritage College Dictionary, p. 698 (Third Edition Houghton Mifflin Co. 1993).
>
> **Encroach:** To take another's possession or rights *gradually* or *stealthily*.—*Id.* at 453.

Infringing is exactly what Congress has been doing since 1934.

The right of the people to keep and bear arms shall not be infringed by Congress. *Presser v. Illinois*, *supra* at 267, *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

For how this Court is supposed to adjudicate a constitutional issue, see *Lake County v. Rollins*, 9 S.Ct. 651, 652 (1889), *Crawford v. Washington*, 124 S.Ct. 1354 (2004) (discussing original intent).

This Court's guidance on this issue is sorely needed in the lower courts.

> The lower courts generally have either adopted an interpretation that is implausible on its face, inconsistent with Supreme Court precedent, and unsupported by historical evidence about the intention of the Framers, or adhered to ancient precedents that

> treated the Bill of Rights as being inapplicable to the States. The Supreme Court, moreover, inscrutably denies all petitions for *certiorari*.
>
> Lund, *supra*.

The Supreme Court's guidance [on the Second Amendment] has been notoriously scant. *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999).

The Supreme Court has shamelessly refused to discuss the issue. Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 654 (1990).

The lower appellate courts even disagree with themselves.

The Second Amendment right held by the states, does not protect the possession of a weapon by a private citizen. *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996).

The Second Amendment embodies the right to defend oneself and one's home against physical attack. *United States v. Gomez*, 81 F.3d 846, 850 n. 7 (9th Cir. 1996). Title 18 U.S.C. § 922(g)(1) subject to justification defense. *Id.* at 851.

II. Congress does not have the authority to regulate the right specified in the Second Amendment, U.S. Constitution, through the enactment of ordinary legislation.

Obviously, the people (or voters) are the *only* political body that can *legitimately* encroach on, infringe, or amend the Constitution via referendum. Article V is quite plain.

> The **only** power to amend the Constitution is contained in Article V, and is a delegated power. *Hawke v. Smith*, 253 U.S. 221 227; *Dodge v. Woolsey*, 18 How. 348. It is a power to "amend," granted in general terms.
>
> *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed.

505 (1922).

Nor can we concur in Mr. Webster's apparent view that when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may by its mere subsequent legislation reverse such construction. It is not given power by itself thus to amend the Constitution.

Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

JUSTICE STEVENS, concurring.
It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985). In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*, 134 U.S. 1 (1890). With respect to the former—the legitimate scope of the Eleventh Amendment limitation on federal judicial power—I do not believe Congress has the power under the Commerce Clause, or under any other provision of the Constitution, to abrogate the States' immunity. **A statute cannot amend the Constitution**.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989).

Amending the Constitution is precisely what Congress did in the enactment of every "reasonable restriction" of firearms possession since 1934.

Amendment of the Constitution by legislative enactment is prohibited. *United Transp. Union v. ICC*, 891 F.2d 908, 915-916 (D.C. Cir. 1989).

The Third Circuit Court of Appeals appears to have addressed this issue only *once* in the twentieth century, in a concurring in part and dissenting in part opinion.

> Judicial amendment of the Constitution and its Amendments is violative of Article V of the Constitution which provides in relevant part that "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes... when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof...."
>
> Judicial legislation contravenes Article I, § 1 of the Constitution which reserved to the Congress the power to legislate. *American Dredging Co. v. Local 25, AFL-CIO*, 338 F.2d 837, 850 (3d Cir. 1964), *cert. denied*, 380 U.S. 935, 85 S.Ct. 941, 13 L.Ed.2d 822 (1965).
>
> *Polite v. Diehl*, 507 F.2d 119 (3rd Cir. 1974).
>
> "Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations." 211 U.S. at 106-07.
>
> *Id.*

Inserting their own personal views is *exactly* what the lower courts have done regarding Second Amendment adjudication.

III. A defendant in a federal criminal case has the right to argue his understanding of the Constitution to a jury.

> For to say, they are not at all to meddle with, or have respect to Law in giving their Verdicts, is not only a *false* position, and contradicted by every days *experience*; but also a very *dangerous* and *pernicious* one, tending to defeat the principal end of the Institution of Juries, and so subtilly to *undermine* that which was *too strong* to be *batter'd down*.
>
> Sir John Hawles, *The English-man's Right*, pp. 10-11 (1680) (Solicitor-General of England in the reign of William III).
>
> [U]ltimately, the guarantee of [our] rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.
>
> *Bracy v. Gramley*, 81 F.3d 684, 703 (7th Cir. 1996) (dissent), *reversed*, 520 U. S. 899, 117 S.Ct. 1793 (1997).
>
> It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.
>
> *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

Those rights are also entrusted to the *jury*.

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority....If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.
>
> *Duncan v. Louisiana*, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968).

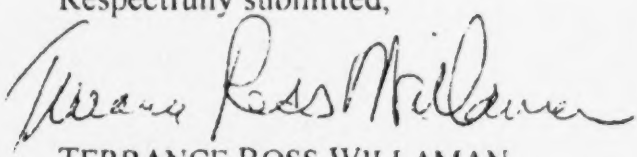
Forcing a jury to merely be a rubber stamp by "one judge" enables the "unchecked power" of the federal government to trample the rights of citizens. If a jury is not allowed to determine if a statute violates fundamental constitutional principles, the Bill of Rights and in particular the Second Amendment is absolutely worthless.

If Constitutional provisions and arguments are *denied* to the jury, then the judge has become the sole fact-finder in the trial.

CONCLUSION

For the reason set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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